

*** CAPITAL CASE ***

No. 17-6844

IN THE
SUPREME COURT OF THE UNITED STATES

TODD WESSINGER,

Petitioner,

VERSUS

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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March 30, 2018

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, petitioner respectfully petitions this Court for rehearing of its March 5, 2018 order denying the petition for a writ of certiorari in this case, with Justice Sotomayor dissenting from the denial of certiorari. Petitions for rehearing of an order denying certiorari are generally granted in two instances: if a petitioner can demonstrate “intervening circumstances of a substantial or controlling effect”; or if a petitioner raises “other substantial grounds not previously presented.” R. 44.2. As set forth below, petitioner satisfies both categories.

GROUND FOR REHEARING

This petition provides an unparalleled vehicle for review of the critically important questions presented by the Fifth Circuit’s ruling in this capital case. The record of the state trial and post-conviction proceedings and the *post-Martinez v. Ryan*, 566 U.S. 1 (2012), five-day federal habeas evidentiary hearing demonstrate that petitioner’s trial counsel did not attempt to discover significant mitigation evidence of petitioner’s major neurocognitive disorder that compromises his decision-making abilities or mitigation evidence of his family history of poverty, alcoholism and domestic violence. State postconviction counsel “similarly failed to conduct any mitigation investigation in preparation for his state habeas petition.” *Wessinger v. Vannoy*, 138 S.Ct. 952, 952-953 (2018) (Justice Sotomayor, dissenting from the denial of certiorari). The Fifth Circuit nevertheless reversed the district court’s *de novo* determination of the substantiality of the ineffective-assistance-of-trial-counsel claim and the ineffectiveness of postconviction counsel under the Sixth Amendment. In so doing, the appellate court applied the framework of *Strickland v. Washington*, 466 U.S. 668 (1984), to conclude, as noted by the Fifth Circuit panel dissent, that the denial of investigative funds by the

state excuses capital defense counsel’s failure to perform *any* independent mitigation investigation, including work that counsel could have done himself such as interviewing known witnesses and family members and reviewing medical and school records. *Wessinger v. Vannoy*, 864 F.3d 387, 393 (5th Cir. 2017) (opinion of Dennis, J.).

The Fifth Circuit’s conclusion is clearly wrong and constitutes “the type of error that warrants relief under this Court’s precedent.” 138 S.Ct. at 954 (Justice Sotomayor, dissenting from the denial of certiorari). Moreover, as evidenced by this Court’s opinion in *Ayestas v. Davis*, 584 U.S. ____ (2018), the Fifth Circuit’s adoption of the wrong standard of ineffective assistance of counsel in this case, if left to stand, has strong, and fateful, implications for the proper determination of the availability of resources in capital federal habeas cases in order to investigate procedurally defaulted ineffective assistance claims and seek relief from the procedural bar under *Martinez v. Ryan*, 566 U.S. 1 (2012).

In *Ayestas v. Davis*, 584 U.S. ____ (2018), decided after the petition for writ of certiorari was denied in this case,¹ this Court reversed the Fifth Circuit’s wrongful denial of funding for a mitigation investigation in a capital federal habeas case. In that case, the federal habeas petitioner, in challenging his state death sentence, moved for funding under 18 U.S.C. § 3599(f), which makes funds available if they are “reasonably necessary.” Petitioner, by then represented by a fourth set of attorneys, sought funding in federal habeas to investigate his claim, never raised in state collateral proceedings, that his trial counsel was ineffective for failure to conduct an adequate search for mitigation evidence of his mental illness and substance abuse, and that his state postconviction

¹In his petition for writ of certiorari, petitioner requested that the Court defer decision on the petition at least until an opinion issued in *Ayestas*. Petition for Writ of Certiorari at p. 23, n. 3.

counsel was ineffective for failing to raise the claim such that the claim was not barred by a procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). *Id.*, at 4-6.

In reversing the Fifth Circuit and its application of a “substantial need” test requiring a viable constitutional claim that is not procedurally barred, this Court concluded that the “reasonably necessary” standard requires federal courts “to consider the potential merit of the claims that the applicant wants to pursue, the likelihood that the services will generate useful and admissible evidence, and the prospect that the applicant will be able to clear any procedural hurdles standing in the way.” *Id.* at 17-18. This Court remanded the case to the Fifth Circuit for further proceedings consistent with its opinion.

Even with this Court’s clarification of the standard embodied in the “reasonably necessary” language of 18 U.S.C. § 3599(f), it remains that in the capital habeas context in which the federal habeas petitioner seeks funding to investigate a claim of trial counsel’s ineffective assistance that was not raised in state collateral proceedings, which procedural default the petitioner seeks to overcome under *Martinez*, “[t]he substantiality of the ineffective-assistance-of-trial-counsel claim and the ineffectiveness of post-conviction counsel are both analyzed under the familiar framework set out in *Strickland*” *Ayestas v. Davis*, 584 U.S. ____ (2018) at p. 3 (Justice Sotomayor, with whom Justice Ginsburg joins, concurring). Unfortunately, in *Ayestas*’s case, as in petitioner’s, the Fifth Circuit misapplied *Strickland* in assessing the deficient performance of both trial counsel and postconviction counsel with regard to their failures to conduct a thorough mitigation investigation. *Id.* at p. 6-8.

While this Court did not decide the issue of the propriety of *Strickland*'s application by the Fifth Circuit in *Ayestas*, the concurrence made clear that, contrary to the Fifth Circuit's analysis, even in the absence of a documented diagnosis of mental illness, both trial and postconviction counsel had a duty under *Strickland* to conduct a thorough mitigation investigation into the petitioner's mental health and substance abuse "in part precisely because it is all too common for individuals to go years battling an undiagnosed and untreated mental illness." *Id.* at p. 7. Moreover, with respect to prejudice under *Strickland*, the concurrence concluded that "[e]ven with the scant evidence in the record at this time as to what Ayestas could have presented to the jury in the form of mitigation, Ayestas has made a strong showing that his claim has potential merit." *Id.* at p. 9. Since this Court has held that evidence of mental illness and substance abuse is relevant to assessing moral culpability," see *Rompillo v. Beard*, 545 U.S. 374, 393 (2005), the Fifth Circuit further erred in its assessment that there is no prejudice because no amount of mitigation would have changed the outcome of the sentencing given the brutality of the crime. *Id.* at p. 10-11.

Clearly, the Fifth Circuit's erroneous interpretation and application of the *Strickland* framework as reflected in petitioner's case, as well as in *Ayestas*, if left to stand, will have a substantial impact on the resolution not only of Sixth Amendment ineffective assistance of counsel claims in general, but also, in particular, of procedurally defaulted ineffective assistance of counsel claims for which relief from a procedural bar is sought pursuant to *Martinez*, as well as related funding issues under Section 3599(f).

The present case, wherein the federal habeas record contains substantial evidence of the mitigation that could have been presented to petitioner's jury but was not because of mitigation investigation failures of both trial and postconviction counsel is the best vehicle for addressing the

Fifth Circuit’s application of *Strickland* in this critical context and, for this reason, this Court should grant certiorari review. At the very least, the Court should hold the rehearing petition and defer decision pending the Fifth Circuit’s resolution of *Ayestas* on remand in the interest of justice and judicial efficiency. *See, e.g., United States v. Ohio Power Co.*, 351 U.S. 980 (1956) (“continu[ing]” petition for rehearing until the following Term); *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957) (explaining deferral of rehearing petition on ground that “[w]e have consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules”); *see also Boumediene v. Bush*, 551 U.S. 1160 (2007) (petition for rehearing granted, order denying the petition for writ of certiorari vacated, and the petition for writ of certiorari granted, with supplemental briefing scheduled upon the issuance of any decisions in two cases pending before the United States Court of Appeals for the District of Columbia).

Petitioner’s case also presents in bold relief the insurmountable problems with the imposition of the death penalty and its unconstitutionality under the Eighth Amendment, the question presented by the pending petition for writ of certiorari pending in *Evans v. Mississippi*, No. 17-7245.² This Court has repeatedly held that the failure to perform mitigation investigation constitutes deficient performance, *see, e.g., Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding deficiency where

²In contrast, in *Hidalgo v. Arizona*, 583 U.S. ____ (2018) (Statement of Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, respecting the denial of certiorari), this Court denied certiorari review of an Eighth Amendment challenge to Arizona’s capital sentencing scheme and its use of aggravating factors to make the eligibility decision where the opportunity to develop the record through an evidentiary hearing had been denied and the record had not been fully developed. Additionally, the selection decision, the second aspect of the capital punishment decision whereby the jury must make an individualized determination as to whether a death-eligible defendant should actually receive the death penalty based on consideration of relevant mitigating evidence of the character and record of the defendant and circumstances of the crime, was not before the Court. *Id.* at 2-3.

“counsel did not fulfill their obligation to conduct a thorough investigation of the defendant’s background”); *Porter v. McCollum*, 558 U.S. 30, 40 (*per curiam*) (“The decision not to investigate did not reflect reasonable professional judgment”). The fully developed federal evidentiary hearing record demonstrates petitioner’s trial counsel did not conduct a mitigation investigation, his first postconviction counsel did nothing on his case; his second counsel, a first year associate with no capital or criminal defense experience whose firm accepted the case *pro bono*, delayed in requesting funds for a mitigation investigation from the state court immediately upon taking the case; and, when counsel ultimately made the requests, the state post-conviction court viewed them as unsupported by any facts. Further, the record demonstrates that state post-conviction counsel not only did not conduct any mitigation investigation on his own at any point in his representation of petitioner, he also completely abandoned the case and the client for 1½ years.

The Fifth Circuit nevertheless concluded postconviction counsel’s failure to present evidentiary support of the penalty phase ineffectiveness claim to the state post-conviction court was not attributable to his inexperience or any particular error, but because the state post-conviction court did not grant his motion for funds. 864 F.3d at 392-394. The appellate court also concluded that petitioner failed to satisfy the prejudice inquiry because he could not show that initial review counsel’s “particular unreasonable errors, rather than decisions by the state post-conviction court,” had an adverse effect on the defense. *Id.* at 393.

Because the state postconviction court denied counsel any resources for the investigation of trial counsel’s ineffectiveness, petitioner will remain on death row without a jury ever considering the significant undisputed mitigation evidence relevant to the issue of moral culpability, a result that strikes at the heart of the integrity of the capital proceedings. This result is fundamentally unjust and

unfair. This Court should grant the petition and order briefing as well on the issue of whether the death penalty violates the Constitution. Alternatively, this Court should hold the rehearing petition and defer decision pending the resolution of *Evans*.

CONCLUSION

For all the foregoing reasons, petitioner respectfully prays that this Court grant his rehearing application, grant his writ of certiorari and permit briefing and argument on the issues presented or, alternatively, defer consideration of the rehearing application pending further proceedings.

RESPECTFULLY SUBMITTED,

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I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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